APPENDIX A

United States Court of Appeals

FOR THE SECOND CIRCUIT

No. 155——September Term, 1961

(Argued December 14, 1961 Decided April 10, 1962.)

Docket No. 27096

AEROGLIDE CORPORATION,
Plaintiff-Appellee,

against

WILLIAM A. ZEH, ROBERT W. GILLISPIE, JR., ISIDORE KRUPSKI, HAROLD E. GOODALE, ALFRED W. TOPPING, JOSEPH P. CELIC, THOMAS H. WHITE, J. DWIGHT REEVE, JOHN P. KUJAWSKI, JOSEPH SIEMINSKI and WALTER TRUSKOLASKI,
Defendants-Appellants.

Before: LUMBARD, Chief Judge and
MOORE, and HAYS, Circuit Judges.

Appeal from a judgment entered in the United States District Court for the Eastern District of New York after a trial without a jury before John L. Miller, Judge, sitting by special assignment, holding appellants liable for a corporate conversion in which they personally participated.

Affirmed in part and reversed in part.

MOORE, Circuit Judge:

Defendants-appellants appeal from a judgment holding them jointly and severally liable for $13,302.51 with interest, the amount remaining due upon machinery purchased from

plaintiff-appellee, AEROGLIDE CORPORATION (Aeroglide), by SUFFOLK FARMERS COOPERATIVE ASSOCIATION, INC. (the Cooperative) of which they were directors. The case was tried to the court without a jury. Jurisdiction is based upon diversity of citizenship, appellants being citizens of New York and appellee being a North Carolina corporation.

The defendants were farmers. They served the Cooperative as directors without salary. On May 23, 1956, Cooperative's board of directors, after discussing proposals submitted by Aeroglide, constituted Zeh, Gillispie, Krupski and Krusinowski (now deceased), a committee to negotiate for the purchase of certain machinery by the Cooperative. The committee visited Aeroglide's plant in Raleigh, N. C., and on May 28, 1956, the Cooperative's president, Zeh, signed a contract for the purchase of grading and packaging machinery at a cost of $61,000. Other orders were given by telephone and, except for one parts order, were confirmed in writing. On the face of the written proposals, contracts and confirmations appeared the words "(subject to conditions printed on reverse side of this sheet)" and on the reverse side under "CONDITIONS" the statement that "Legal title to the equipment will remain in the Seller until full payment as herein stipulated has been received by Seller. Buyer agrees to do anything necessary to see that title so remains in the Seller."

Thereafter and on May 31, 1956, the board of directors was advised of the committee's action and authorized the payment of one-third ($20,333.33) of the contract purchase price ($61,000). Between May 18 and November 12, 1956, the Cooperative had purchased from Aeroglide machinery, the total price of which was $84,922.96 and up to January 8, 1957, had paid $71,620.45, leaving $13,302.51 unpaid.

On and prior to February 26, 1957, the Cooperative was indebted to Springfield Bank for Cooperatives, Springfield, Massachusetts (the Bank) for some $75,000, and was being pressed by the Bank for security as a condition to a further

extension. Without Aeroglide's knowledge or consent, on February 26, 1957, the board of directors, Zeh, Goodale, Topping, White, Reeve, Kujawski, Sieminski and Truskolaski, voting in favor of the resolution, Gillispie, Krupski and Celic, being absent and not voting, authorized the execution and delivery of a chattel mortgage to the Bank of all machinery and equipment on hand which included all the machinery purchased from Aeroglide except two items costing some $4,000. On February 27, 1957, Zeh as president and Krupski as treasurer executed a chattel mortgage in favor of the Bank of all the machinery purchased from plaintiff with the above-mentioned exceptions. Subsequently in September, 1957 the assignee for the benefit of the Cooperative's creditors sold the tangible personal property including the machinery covered by the mortgage and realized $39,968.19 thereon.

The legal situation was as follows: the sales agreements reserved title in Aeroglide had never been filed. Therefore, whereas the agreements were valid as between Aeroglide and the Cooperative,[1] they were not binding upon the Bank which took the mortgage without notice.[2] In effect the action of the directors in authorizing the mortgage on February 26, 1957, was to transfer Aeroglide's property to the Bank. Alleging that this act by the participating directors constituted a conversion of its property, Aeroglide claims the unpaid purchase price as damages. The trial court found that the value of the machinery was in excess of the unpaid $13,302.51 and awarded a judgment in this amount.

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[1] *Stewart & Co.* v. *Rivara*, 274 U. S. 614 (1927), affirming *Rivara* v. *Steward & Co.*, 241 N. Y. 259, 149 N. E. 851 (1925); *In re Lake's Laundry*, 79 F. 2d 326 (2d Cir. 1935), cert. denied, 296 U. S. 622 (1935); *In re White Plains Ice Service Inc.*, 109 F. 2d 913 (2d Cir. 1940).

[2] *Rodney Hunt Machine Co.* v. *Stewart*, 57 Hun 545, 11 N. Y. S. 448 (3rd Dept. 1890).

See also *Ryerson & Son, Inc.* v. *O'Donnell, Inc.*, 279 N. Y. 109 (1938).

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Aeroglide concedes that the directors are not liable for the conversion merely because they were directors and officers of the corporation at the time. "The ordinary doctrine is that a director, merely by reason of his office, is not personally liable for the torts of his corporation; he must be shown to have personally voted for or otherwise participated in them." Fletcher, Private Corporations § 1137 (perm. ed. rev. repl. 1947). This rule was recently cited with approval in *Armour & Co.* v. *Celic*, 2 Cir. 1961, 294 F. 2d 432, 439, which involved a suit on another transaction against eight of these same directors. The law of New York, the place of the wrong, is applicable. Under New York law, the execution and delivery of a chattel mortgage, without transfer of possession, affecting property to which the mortgagor has not acquired title, constitutes a conversion. "The conditional vendee is still, in effect, the vendor's bailee, and as such remains liable to the vendor for any conversion of the goods." (*Rodney Hunt Machine Co.* v. *Stewart*, 57 Hun 545, 552, 11 N. Y. S. 448, 451 (3rd Dept., 1890).) See also *Kominz Tire Co.* v. *Universal Credit Co.*, 258 App. Div. 774, 14 N. Y. S. 2d 840 (4th Dept., 1939); *Credit Acceptance Corp.* v. *Fohl*, 251 App. Div. 796, 296 N. Y. S. 777 (4th Dept., 1937).

Appellants concede that personal participation would appear to be sufficient to place liability on a corporate director and cite a fairly recent New York case (*Melnick* v. *Sable*, 11 A. D. 2d 1075, 206, N. Y. S. 2d 825, 826 (Second Dept., 1960) for the proposition that "such liability [for conversion] accrues only against the individual officer who consummated the conversion through his personal action." As stated in *Passaic Falls Throwing Co.* v. *Villeneuve-Pohl Corp.*, 169 App. Div. 727, 729, 155 N. Y. Supp. 669, 670 (1st Dept., 1915), "every person is liable who personally or by agent commits an act of conversion or who participates by instigating, aiding or assisting another."

Upon this very theory, the trial court held the directors liable because they did personally participate in the acts constituting conversion, namely, by authorizing the execution of the chattel mortgage. That there was no direct evidence in the record that the directors were aware of Aeroglide's security interests is not determinative. The tort of conversion requires no intent or fault. The determinative question then is whether these directors personally participated in the conversion which resulted from the execution and delivery of the mortgage. Appellants Zeh and Krupski are liable because they signed the mortgage; this is clearly personal participation in the act constituting conversion even though done on behalf of the corporation. Personally voting for the mortgage as a director is also sufficient participation. Management of the corporation is vested in the board of directors,[3] and the vote authorizing the execution of the mortgage must be viewed as the basic act from which the conversion resulted. While it is true that there could be no conversion until execution and delivery of the mortgage, the latter are formalities which flow in the normal course of events from the affirmative action taken by the directors.

The only remaining question concerns the liability of Gillispie and Celic. They did not attend the directors' meeting, and, therefore, did not vote for the mortgage as directors. They were among the holders of two-thirds of the shares outstanding who consented in writing to the execution of the mortgage before the vote of the directors.[4] However, Aeroglide does not seek to hold Gillispie and Celic liable as stockholders. Nor would the action of the stockholders have been a conversion in itself; the directors' resolution and the execution of the mortgage were necessary to transfer the title.

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[3] New York General Corporation Law, sec. 27.

[4] New York Stock Corporation Law, sec. 16.

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The natural inclination on the facts of this case is to treat all of these directors alike, and it may be somewhat inequitable to hold that two directors are not liable simply because they failed to appear at a directors' meeting. Yet liability for conversion is imposed not upon the basis of fault but for actions taken, however innocently. Thus, any inequality results from the nature of the tort. We, therefore, reverse as to Gillispie and Celic, and affirm the judgment entered against the other appellants.

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the tenth day of April one thousand nine hundred and sixty-two.

Present:

HON. J. EDWARD LUMBARD, Chief Judge,
HON. LEONARD P. MOORE,
HON. PAUL R. HAYS, Circuit Judges.

AEROGLIDE CORPORATION,
Plaintiff-Appellee,
against
WILLIAM A. ZEH, ROBERT W. GILLISPIE, JR., ISIDORE KRUPSKI, HAROLD E. GOODALE, ALFRED W. TOPPING, JOSEPH P. CELIC, THOMAS H. WHITE, J. DWIGHT REEVE, JOHN P. KUJAWSKI, JOSEPH SIEMINSKI and WALTER TRUSKOLASKI,
Defendants-Appellants.

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcipt of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judement of said District Court as to appellants Robert Gillispie, Jr. and Joseph P. Celic be and it hereby is reversed in accordance with the opinion of this court.

It is further ordered that that part of the judgement as to all the other appellants be and it hereby is affirmed; with costs to the appellee.

A. DANIEL FUSARO,
Clerk.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF NEW YORK

AEROGLIDE CORPORATION, *Plaintiff,* *vs.* WILLIAM A. ZEH, ROBERT W. GILLESPIE, JR., ISIDORE KRUPSKI, HAROLD E. GOODALE, ALFRED W. TOPPING, JOSEPH P. CELIC, THOMAS H. WHITE, J. DWIGHT REEVE, JOHN P. KUJAWSKI, JOSEPH SIEMINSKI and WALTER TRUSKOLASKI, *Defendants.*	CIVIL ACTION No. 19737

FINDINGS OF FACT, DISCUSSION AND CONCLUSIONS OF LAW

MILLER, D.J.

In this proceeding, plaintiff, as a conditional vendor of certain farm implements sold to the Suffolk Farmers Cooperative Association, Inc., seeks to recover damages from the directors of the conditional vendee for an act of conversion committed by the subsequent execution of a chattel mortgage purporting to cover the identical implements.

This action having been tried by the court without a jury, the court makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

1. Plaintiff is a North Carolina corporation and defendants are New York citizens. The amount in contro-

versy, exclusive of interest and costs, exceeds the sum or value of $10,000.00.

2. Plaintiff is a manufacturer of grading and packaging machinery for farm produce with office and plant at Raleigh, North Carolina.

3. From its organization until after February 27, 1957, defendants Zeh, Gillispie, Krupski, Goodale, Celic, White, Reeve, Kujawski, Sieminski and Truskolaski were directors of Suffolk Farmers Cooperative Association, Inc. (hereafter called "Cooperative"), a corporation organized under the New York Cooperative Corporations Law; defendant Topping was a director from November 16, 1956 until after February 27, 1957; defendants Zeh, Gillispie and Goodale were at all times president, vice president and secretary respectively of said corporation and after August, 1956, defendant Krupski was its treasurer.

4. Between May 18, 1956 and November 12, 1956, both dates inclusive, plaintiff sold and delivered to Cooperative grading and packaging machinery for farm produce at the total agreed price of $84,922.96. Between May 28, 1956 and January 8, 1957, Cooperative made payments on account of said purchases aggregating $71,620.45, leaving a balance unpaid of $13,302.51.

5. Said purchases were made pursuant to twelve certain contracts of sale. Said contracts were made on or about May 18, 28, June 4, 6, July 23, 30, August 7, 13 (two contracts), September 7, November 8 and August 28, 1956, respectively.

6. The contract of May 28, 1956, was signed at Raleigh, North Carolina, by James F. Kelly, vice president (and now president), on behalf of plaintiff, and by William A. Zeh, president, on behalf of Cooperative, and was for the

purchase by Cooperative from plaintiff of grading and packaging machinery for farm produce at the total price of $61,000.00.

7. Said contract of May 28, 1956, was negotiated at Raleigh, North Carolina, by a committee consisting of defendants Zeh, Gillispie, Krupski and one Prusinowski (now deceased). Said committee had been constituted by the board of directors May 23, 1956; the committee brought with them to Raleigh proposals previously submitted by plaintiff and discussed by the board; in such negotiation at Raleigh the committee obtained from plaintiff certain concessions including a reduced price, all of which were incorporated in said contract of May 28, 1956.

8. The contracts other than that of May 28, 1956, each resulted from telephoned orders to plaintiff. Following each said telephone conversation, plaintiff mailed to Cooperative a confirmation setting forth the items purchased and the price thereof. In the case of the contract of August 28, 1956, which was for parts to be incorporated in Cooperative's grading and packaging systems, and for which the price was $981.94, no confirmation was sent. The total price of the purchases other than those under the contract of May 28, 1956, was $23,922.96.

9. The machinery delivered under and pursuant to the contracts of May 18, 28, June 4, 6, July 23, 30, August 7, 13 (two contracts), September 7 and November 8, 1956, respectively, was delivered and accepted by Cooperative without objection or protest on the part of Cooperative or any of its officers or directors with respect to any provision contained in said confirmations of contract.

10. On the front of said contracts of May 18, 28, June 4, 6, July 23, 30, August 7, 13 (two contracts), September 7 and November 8, 1956, respectively, and on all other

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written proposals, contracts and confirmations delivered to Cooperative by plaintiff there appeared the following:

> "Aeroglide Corporation proposes to furnish the following (subject to conditions printed on reverse side of this sheet):".

On the reverse side of each sheet, in type of the same size, there appears among such "conditions":

> "Legal title to the equipment will remain in the Seller until full payment as herein stipulated has been received by Seller. Buyer agrees to do anything necessary to see that title so remains in the Seller."

On the reverse side also are these general terms of payment:

> "All prices are f.o.b. Raleigh, North Carolina, and payable at Raleigh, North Carolina, unless otherwise specified and no discounts will be allowed unless specified herein. Any state, local, or federal taxes are to be added to the price quoted."

11. Said contract and confirmations were not filed as conditional sales agreements in any public office where such agreements may be filed under Article 4 of the New York Personal Property Law, or therewise, until August 6, 1957.

12. On or about February 27, 1957, Cooperative was indebted to Springfield Bank for Cooperatives of Springfield, Massachusetts, in the amount of $75,000.00 for money loaned.

13. On February 27, 1957, to secure the payment of said loan and obtain an extension thereof Cooperative, by defendant Zeh as its president and defendant Krupski as its treasurer, and without plaintiff's knowledge or consent, made and executed to said Springfield Bank for Cooperatives a chattel mortgage upon all of the machinery and

equipment then on had. Said machinery and equipment included all of the grading and packaging machinery purchased by Cooperative from plaintiff except a bag closer purchased under the May 28, 1956 contract at the price of $1,908.55, and the machinery purchased under the June 6, 1956 contract, priced at $2,067.83, which bag closer and machinery had been sold to and paid for by defendant Zeh.

14. On February 26, 1957, the board of directors of Cooperative, with defendants Zeh, Goodale, Topping, White, Reeve, Kujawski, Sieminski and Truskolawski voting in favor of said resolution, authorized the execution and delivery of said mortgage. Defendants Gillispie, Krupski and Celic were absent from the meeting.

15. On or prior to December 31, 1956, all of the defendants, including said defendants Gillispie, Krupski and Celic, had as stockholders executed and delivered in writing a consent to the execution and delivery of said mortgage.

16. Said mortgagee, Springfield Bank for Cooperatives, was without notice of the fact that the machinery which Cooperative thus mortgaged to it had been sold by plaintiff to Cooperative pursuant to conditional sales agreements and that the title to said machinery remained in the vendor.

17. At the time of the giving of said chattel mortgage, the total cost of all machinery and equipment purchased by Cooperative was $93,994.60. The only grading and packaging machinery which Cooperative had on hand and which it had not purchased from plaintiff was a Halleck & Gunther elevator or conveyor and a used Boggs grader.

18. At the time of the giving of said mortgage on February 27, 1957, the total value of the grading and packaging machinery purchased by Cooperative from plaintiff pursuant to said agreements of conditional sale was at least the sum of $23,193.50.

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19. At the time of the giving of said mortgage on February 27, 1957, the value of the grading and packaging machinery purchased by Cooperative from plaintiff under the contract of May 28, 1956, at a price of $61,000.00, was at least the sum of $15,335.00.

20. At the time of the execution and delivery of said mortgage on February 27, 1957, the balance of the purchase price of the grading and packaging machinery purchased by Cooperative from plaintiff remaining unpaid was, and it now is, the sum of $13,302.51.

21. Subsequent to the execution and delivery of said mortgage and on September 20, 1957, one Seth Hubbard as assignee for the benefit of creditors sold at auction all tangible personal property then on hand, including the machinery covered by said mortgage, and realized therefrom the total amount of $44,409.10 or after deducting auctioneer's commissions the amount of $39,968.19.

Discussion

Three basic questions are presented for determination by the court: (1) whether the retention of title provisions on the reverse side of plaintiff's printed agreement became part of the agreement between the parties; (2) whether the execution and delivery of a chattel mortgage by a conditional vendee covering machinery subject to a conditional sale constitutes a conversion of such machinery; and (3) whether directors are individually liable in tort for conversion by reason of executing said chattel mortgage on behalf of the Cooperative.*

1. Turning initially to the retention of title question, it is of course fundamental that:

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* Applicability of New York law under the "center of gravity" test, *Auten* v. *Auten*, 308 N. Y. 155, 124 N. E. 2d 99 (1954), is not questioned by the parties.

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> "A party should not be bound by clauses printed on the reverse side of a document unless it be established that such matter was properly called to its attention and that it assented to the provisions there stated."

Arthur Philip Export Corp. v. *Leathertone*, 275 App. Div. 102, 87 N. Y. S. 2d 665, 667 (1949). See also 17 C. J. S., Contracts, § 41(g). It is likewise fundamental that, in the absence of fraud or duress, one who signs or accepts a written agreement is conclusively presumed to have full knowledge of its contents. *Upton* v. *Tribilcock*, 91 U. S. 45 (1875); *Matter of Stone*, 272 N. Y. 121, 5 N. E. 2d 61 (1936); *Metzger* v. *Aetna Insurance Co.*, 227 N. Y. 411, 125 N. E. 814 (1920). Admittedly, the question is one of fact.

Unlike the printed agreement in *Arthur Philip Export Corp.* v. *Leathertone*, supra, where the only reference to the arbitration provision—"(See also back)"—appeared in small print on the right-hand side of the lower center of the face of the document following the signature, the plaintiff's printed agreement contains a reference to the title provisions at the very beginning of the document and annexed to the operative words of the offer. Compare *Fields, Inc.* v. *American Hydrotherm Corp.*, 5 App. Div. 2d 647, 174 N. Y. S. 2d 184 (1st Dept. 1958), where a reference, "1 Hot Water system as per quotation," was held to make binding an arbitration provision in small print on the last page of the quotation. The type here is the same as used throughout the printed agreement and the retention of title provisions appear on the reverse side of each copy. The court concludes that such provisions became part of the agreement between the parties.

Defendants contend, however, that plaintiff is estopped to deny that the relationship between the parties was merely that of vendor-vendee by reason of its failure to file the agreement, and by its use of terms of payment inconsistent with a retention of title.

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As between the parties, a conditional sales agreement is valid despite the fact that it is never filed. *Stewart & Co.* v. *Rivara*, 274 U. S. 614 (1927), affirming *Rivara* v. *Stewart & Co.*, 241 N. Y. 259, 149 N. E. 851 (1925); *In re Lake's Laundry*, 79 F. 2d 326 (2d Cir. 1935), cert. denied 296 U. S. 622 (1935); *In re White Plains Ice Service Inc.*, 109 F. 2d 913 (2d Cir. 1940). Requirements that such agreements be filed are enacted solely for the protection of subsequent purchasers. §65 New York Personal Property Law; *Goetschius* v. *Brightman*, 245 N. Y. 186, 156 N. E. 660 (1927).

Moreover, the fact that plaintiff's monthly statements contained such terms of payment as "Net 10 days" or "Balance due on shipment" does not work an abandonment of the retention of title provisions. Such terms, while certainly inconsistent with an alleged shipment on consignment, cf. *Armour & Co.* v. *Celic*, 188 F. Supp. 700 (E. D. N. Y. 1960), are entirely consistent with a conditional sale.

II. Under New York law, it appears settled that the mere execution and delivery of a chattel mortgage, without transfer of possession, constitutes a conversion. In *Rodney Hunt Machine Co.* v. *Stewart*, 57 Hun. 545, 11 N. Y. S. 448 (3rd Dept. 1890), a case substantially identical to the instant one, the conditional vendee mortgaged water wheels to a mortgagee who had no notice of the unfiled conditional sales agreement. Concluding that the property was converted, the court stated:

> ". . . Under such circumstances, it would seem clear that the sale or mortgage by the conditional vendee, who, as we have seen, was before the performance of the condition under the conditional purchase, but a bailee of the vendor, is a conversion of the conditional vendor's chattel. While the conditional vendor would be precluded by the provisions of this act from pursuing his property, and recovering the same from a *bona fide* purchaser or mortgage, the obligation of the conditional vendee to the vendor is not changed

by this act. The conditional vendee is still, in effect, the vendor's bailee, and as such remains liable to the vendor for any conversion of the goods." 57 Hun. at 552-553.

Similarly, in *Mendelson v. Boettger*, 257 App. Div. 167, 12 N. Y. S. 2d 671 (2d Dept. 1939), aff'd 281 N. Y. 747, 23 N. E. 2d 554, the consolidation of a $40,000 mortgage owned by the trust company, of which the defendants were directors, with two mortgages in which plaintiff owned "First Mortgage Participation" certificates was held to constitute a conversion.

> "The power which the trust company thus arrogated to itself to change the nature of the lien of the mortgages in which plaintiff held an interest could arise only from ownership. This constituted conversion. To constitute conversion there need not be an outright misappropriation of the property of another. It is sufficient if there be interference with the owner's dominion over his property to the exclusion of his rights. In *Laverty* v. *Snethen* (68 N. Y. 522, 524) Church, Ch. J., writes: 'Conversion is defined to be an unauthorized assumption and exercise of the right of ownership over goods belonging to another to the exclusion of the owner's rights. A constructive conversion takes place when a person does such acts in reference to the goods of another as amount in law to appropriation of the property to himself. Every unauthorized taking of personal property, and all intermeddling with it, beyond the extent of the authority conferred, in case a limited authority has been given, with intent so to apply and dispose of it as to alter its condition or interfere with the owner's dominion, is a conversion. (Bouv. Law Dict., title Conversion.)' . . . By the act of defendants, the security has been plunged into confusion, and possibly default, resulting in injury and expense to the plaintiff, and that is all that is necessary to sustain a cause of action in conversion." 12 N. Y. S. 2d at 673-674.

The defendants contend that the chattel mortgage is void under § 15 of the Stock Corporation Law of New York and, therefore, plaintiff has failed to meet its burden of proof which, defendants argue, includes proof of the validity of the mortgage.

As the court understands the law of New York, neither the validity nor invalidity of the mortgage is material in an action for conversion. Plaintiff's security has nonetheless been "plunged into confusion, and possibly default, resulting in injury and expense to the plaintiff, and that is all that is necessary to sustain a cause of action in conversion." *Mendelson* v. *Boettger*, supra. Defendants' exercise of dominion over the machinery in defiance of plaintiff's right, *Debolles* v. *Butterly*, 210 App. Div. 50, 205 N. Y. S. 104 (1st Dept. 1924), and their assertion of ownership inconsistent with that of the plaintiff, *U. S. Fidelity & Guaranty Co.* v. *Newburger*, 263 N. Y. 16, 188 N. E. 141 (1933), constituted a conversion.

In any event, the defendants will not now be heard to deny the natural consequences of their acts. *U. S. Fidelity & Guaranty Co.* v. *Newburger*, supra; 31 C. J. S., Estoppel § 17.

III. The final question, that of the individual liability of the directors, was similarly raised in *Armour & Co.* v. *Celic*, supra, an action against the identical directors for conversion of fertilizer allegedly sold on consignment. Interpreting New York law, Judge Abruzzo held not only that directors are bound by the written terms of an agreement entered into by a corporation because they are charged with knowledge of its existence, but also that directors are jointly and severally liable for torts committed on behalf of a corporation and the fact that they also acted on behalf of the corporation would not relieve them from personal liability. (See authorities cited therein.) Having previously found the retention of title provisions to be part of the agreement

between the parties, the court concludes that defendants are charged with knowledge of its existence. Their participation in the execution and delivery of the chattel mortgage, although done solely on behalf of the Cooperative, renders them j ly and severally liable.

CONCLUSIONS OF LAW

1. This court has jurisdiction of the case upon the grounds of diversity of citizenship and amount in controversy.

2. There is due and owing from Cooperative to plaintiff upon its purchases from plaintiff of grading and packaging machinery the sum of $13,302.51.

3. The several agreements of May 18, 28, June 4, 6, July 23, 30, August 7, 13 (two contracts), September 7, November 8 and August 28, 1956, respectively, were agreements of conditional sale and the effect thereof was that until full payment of the purchase price therefor Cooperative acquired no title to the machinery sold thereunder, but plaintiff retained such title unless and until it should be deprived thereof in favor of third persons in accordance with Article 4 of the New York Personal Property Law.

4. Springfield Bank for Cooperatives was a mortgagee without notice of the machinery covered by the mortgage executed and delivered by Cooperatives to said bank on or about February 27, 1957.

5. Th effect of the mortgage of February 27, 1957, from Cooperative to Springfield Bank for Cooperatives was to extinguish plaintiff's said retained title to said machinery and equipment.

6. The execution and delivery of said mortgage by Cooperative to said Springfield Bank for Cooperatives constituted a conversion of plaintiff's property in said grading and packaging machinery.

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7. Defendants and each of them participated in said conversion.

8. Defendants and each of them are jointly and severally liable to plaintiff in the amount remaining due upon said purchases of grading and packaging machinery by Cooperative from plaintiff, and plaintiff is entitled to recover from said defendants and from each of them the sum of $13,302.51 with interest thereon from February 27, 1957, together with the costs of this action.

ORDER OF COURT

Now, this 1st day of June, 1961, after trial by the court without a jury, and the hearing of all the evidence, and upon the findings of fact and conclusions of law, it is ORDERED and DIRECTED that judgment be entered in the sum of $13,302.51 with interest from February 27, 1957, in favor of the plaintiff, Aeroglide Corporation, and against the defendants, William A. Zeh, Robert W. Gillispie, Jr., Isidore Krupski, Harold E. Goodale, Alfred W. Topping, Joseph P. Celic, Thomas H. White, J. Dwight Reeve, John P. Kujawski, Joseph Sieminski and Walter Truskolaski, together with the costs.

/s/ JOHN L. MILLER
United States District Judge

APPENDIX D

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

AEROGLIDE CORPORATION,
Plaintiff,

against

WILLIAM A. ZEH, ROBERT W. GILLISPIE, JR., ISIDORE KRUPSKI, HAROLD E. GOODALE, ALFRED W. TOPPING, JOSEPH P. CELIC, THOMAS H. WHITE, J. DWIGHT REEVE, JOHN P. KUJAWSKI, JOSEPH SIEMINSKI and WALTER TRUSKOLASKI,
Defendants.

CIVIL ACTION.
No. 19737
JUDGMENT

June 2, 1961

Upon the foregoing direction of the Court judgment in the sum of $13,302.51 with interest from February 27, 1957, is hereby rendered against all of the defendants and judgment for costs when taxed shall also be rendered and entered against all of the defendants.

/s/ SIDNEY R. FEUER,
Clerk.

APPENDIX E

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

ARMOUR AND COMPANY, *Plaintiff*, v. JOSEPH P. CELIC, J. DWIGHT REEVE, JOHN BAUER, THOMAS WHITE, ALBERT TOPPING (first name "ALBERT" being fictitious, true first name unknown to plaintiff), WILLIAM A. ZEH, ROBERT W. GILLISPIE, HAROLD E. GOODALE and ISIDORE P. KRUPSKI, *Defendants*.	Civil Action No. 18151

January 22, 1958

ABRUZZO, D. J.

This is an application made by eight of nine defendants to dismiss the complaint on the ground that the plaintiff does not state a claim upon which relief can be granted or, in the alternative, that an order be entered requiring the plaintiff to make its complaint more definite and certain.

The complaint alleges in substance that the defendants are and were directors of Suffolk Farmers Co-Operative Association, Inc., hereinafter referred to as the Co-Operative; that plaintiff agreed to deliver and the Co-Operative agreed to accept fertilizer on consignment and for plaintiff's account, all demands and accounts resulting from the sale of the fertilizer to become and remain the property of the plaintiff; that pursuant to the agreement plaintiff made deliveries to the Co-Operative on consignment; that the Co-Operative sold the fertilizer but that the purchase

moneys were not remitted to plaintiff but were converted by the Co-Operative and by the defendants to their own use and to the use of others; that each of the defendants had cause to know and did know that the goods and credits of the plaintiff were being converted.

The defendants move to dismiss the complaint, contending that it is insufficient because plaintiff has failed to plead a cause of action under the provisions of Sections 60 and 61 of the General Corporation Law of the State of New York.

Section 60 provides in part:

> § 60. *Action against officers of corporation for misconduct.*
>
> An action may be brought against one or more of the directors or officers of a corporation to procure judgment for the following relief or any part thereof:
>
> * * *
>
> 2. To compel them to pay to the corporation, or to its creditors, any money and the value of any property, which they have acquired through any neglect of or failure to perform or other violation of their duties.
>
> * * *

Section 61 provides that a creditor, among others, may bring the action prescribed in Section 60.

The plaintiff's complaint is not predicated on either of these sections.

The complaint pleads a plain case of conversion of moneys allegedly belonging to plaintiff by either the Co-Operative, plaintiff's agent to sell and return the proceeds of the sale to plaintiff, or the directors of the Co-Operative, or both.

In *Sturm* v. *Boker*, 150 U. S. 312, 330, it was held that an agency to sell and return the proceeds or the specific goods stands upon the same footing as a bailment (cited with approval in *Ludvigh* v. *American Woolen Co.*, 231 U. S. 522,

528). Nor can the proceeds of a bailment be subjected by the bailee's creditors to the payment of bailee's debts. *Sturm v. Boker, supra.*

The Co-Operative was not made a party to this suit; nevertheless, the plaintiff may maintain this action against these defendants for conversion of plaintiff's money for their own use or the use of others with their knowledge and consent.

Rule 8(a) of the Federal Rules of Civil Procedure provides:

> Rule 8. *General Rules of Pleading.*
>
> (a) *Claims for Relief.* A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim, or third-party claim, shall contain (1) a short and plain statement of the grounds upon which the court's jurisdiction depends, unless the court already has jurisdiction and the claim needs no new grounds of jurisdiction to support it, (2) a short and plain statement of the claim showing that the pleader is entitled to relief, and (3) a demand for judgment for the relief to which he deems himself entitled. Relief in the alternative or of several different types may be demanded.

In *Dioguardi* v. *Durning*, 139 F. 2d 774 (C. A. 2d), it was said (p. 775):

> Under the new rules of civil procedure, there is no pleading requirements of stating "facts sufficient to constitute a cause of action," but only that there be "a short and plain statement of the claim showing that the pleader is entitled to relief," Federal Rules of Civil Procedure, rule 8(a), 28 U. S. C. A. following section 723c; * * *

The Court is of the opinion that the plaintiff in its complaint has given the defendants fair notice of the nature and basis of its claim and, therefore, the defendants' motion is denied in its entirety.

ABRUZZO,
U. S. D. J.